

2:11 pm, Jan 24, 2020

U.S. DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
LONG ISLAND OFFICE

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
:  
UNITED STATES OF AMERICA, :  
:  
: 13-CR-00607 (JFB)  
:  
v. : 100 Federal Plaza  
: Central Islip, New York  
KENNER, et al., :  
: January 22, 2020  
Defendants. :  
-----X

TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE  
BEFORE THE HONORABLE JOSEPH F. BIANCO  
UNITED STATES VISITING JUDGE

APPEARANCES:

For the Government: MATTHEW HAGGANS, ESQ.  
U.S. Attorney's Office, EDNY  
271 Cadman Plaza East  
Brooklyn, New York 11201  
  
MADELINE M. O'CONNOR, ESQ.  
DIANE C. LEONARDO-BECKMANN, ESQ.  
U.S. Attorney's Office, EDNY  
610 Federal Plaza, 5th Floor  
Central Islip, New York 11722  
  
For Himself: PHILLIP A. KENNER, Pro Se  
No. 07480-408  
MDC Brooklyn  
Metropolitan Detention Center  
PO Box 329001  
Brooklyn, New York 11232  
  
As Stand-By Counsel for Phillip Kenner: MATTHEW W. BRISSENDEN, ESQ.  
Matthew W. Brissenden, P.C.  
666 Old Country Road  
Suite #501  
Garden City, New York 11530

Proceedings recorded by electronic sound recording, transcript  
produced by transcription service.

1

2

2

3 APPEARANCES: (Continued)

4

For Tommy C. Constantine: SANFORD TALKEN, ESQ.  
Talkin Muccigrosso & Roberts, LLP  
40 Exchange Place  
18th Floor  
New York, New York 10005

7

Court Transcriber: RUTH ANN HAGER, C.E.T.\*\*D-641  
TypeWrite Word Processing Service  
211 North Milton Road  
Saratoga Springs, New York 12866

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 (Proceedings began at 1:21 p.m.)

2 THE CLERK: Criminal cause for a status conference  
3 in 13-CR-00607, United States of America v. Phillip Kenner,  
4 Tommy Constantine. Counsel, please state your appearances for  
5 the record.

6 MR. HAGGANS: Good afternoon, Your Honor. Matthew  
7 Haggans for the United States. I'm joined today by AUSAs  
8 Maddy O'Connor and Diane Leonardo. I'm also -- excuse me,  
9 Diane Beckmann. I'm also joined by Special Agent Matthew  
10 Galiado [ph.]. And behalf of AUSA Komatiereddy, who could not  
11 be here today -- she's preparing for trial -- I wanted to let  
12 the Court know that she's unfortunately unavailable.

13 THE COURT: Okay. Good afternoon.

14 MR. HAGGANS: Thank you, Your Honor.

15 THE COURT: Good afternoon to all of you.

16 MR. TALKEN: Good afternoon, Your Honor. Sam Talken  
17 for Mr. Constantine, who's seated to my left.

18 THE COURT: Yes, good afternoon. Good afternoon,  
19 Mr. Constantine.

20 MR. CONSTANTINE: Good afternoon, Your Honor.

21 MR. KENNER: And good afternoon, Your Honor. Phil  
22 Kenner, *pro se* defendant with stand-by counsel Matthew  
23 Brissenden.

24 THE COURT: Good afternoon, Mr. Kenner; good  
25 afternoon, Mr. Brissenden.

1 MR. BRISSENDEN: Good afternoon, Your Honor.

2 THE COURT: As you know, this is a status conference  
3 oral argument that I've scheduled in connection with the  
4 outstanding issues, so I'm just going to tell you what I hope  
5 to accomplish today. Obviously, we had some additional  
6 briefing on the forfeiture issue, which I had requested. I  
7 also received under seal today the Government provided a copy  
8 of the appraisal and I appreciate the Government getting that  
9 done as I had requested prior to this conference. So I wanted  
10 to discuss the forfeiture issue and then the other reason is  
11 for both sides to highlight anything they want to highlight  
12 from the objections to the PSR. So that was my plan.

13 I think because I know there are people here who are  
14 here for the forfeiture. As I usually do, I'll start with the  
15 forfeiture. I just want to note, the Government submitted the  
16 appraisal under seal *ex parte* and put in a letter that they do  
17 not intend to disclose the appraisal to the parties or any  
18 third party, correct?

19 MS. O'CONNOR: That's correct, Your Honor.

20 THE COURT: I -- I just want to emphasize because I  
21 did receive it and obviously I strongly urged the Government  
22 to have that appraisal and to get it done quickly. And I'm  
23 assuming that I'm going to get a request from the defendants  
24 to get a copy of that appraisal. But I don't believe it --  
25 they really didn't need to submit it to me because it has no

1 bearing on the legal question regarding the forfeiture of the  
2 property. In other words, the property is either forfeitable  
3 or it's not forfeitable based upon the evidence that the  
4 Government presented.

5           The issue is that the value of the property really  
6 was just a matter of prosecutorial discretion. In other  
7 words, if the property is forfeitable under the law if there  
8 was not sufficient equity in the property to make it  
9 beneficial to the Government to pursue it because of all the  
10 collateral consequences that various lawyers and parties have  
11 been suggesting would happen from the forfeiture of the  
12 property, economic consequences to innocent third parties,  
13 this obviously has been something that the Court has continued  
14 to urge the Government to look at. They revised the orders  
15 even further to try to minimize those risks and the various  
16 concerns that parties have raised and that the Court has  
17 raised with the Government and I'm glad to see that they did  
18 that.

19           But with respect to the appraisal, it has -- it has  
20 no bearing. So there's no reason for me to require the  
21 Government to disclose that to anybody. I would just note I  
22 don't think the Government has any issue with me disclosing  
23 the fact that the -- that by virtue of the appraisal that the  
24 equity in the property exceeds what the bank would be owed.  
25 So the Government's purpose in providing it to me is to show

1 that based upon their appraisal they believe that there is  
2 money that can be recovered. But in terms of the amounts,  
3 again there's no -- I don't think it has any legal bearing.  
4 So -- but if anyone -- if anyone wants to be heard on that  
5 issue, Mr. Talken, I -- before I hear from the lawyers I'm  
6 just --

7 MR. TALKEN: Your Honor, I don't need specifics from  
8 our point of view. You know clearly what our position is as  
9 far as who gets it and --

10 THE COURT: Okay.

11 MR. TALKEN: The only issue we have is it's  
12 important that there is equity that exceeds the bank amount  
13 because that means there is money available to the victims of  
14 these crimes and that's something that we'll take up at the --  
15 when we actually do the sentencing and deal with 3553(a)  
16 factors.

17 THE COURT: Okay. Mr. Kenner.

18 MR. KENNER: Well, Your Honor, I just wanted to  
19 point out to the Court that in the Government's submission at  
20 ECF 780, Page 6 at Footnote 2, that based on our conversation  
21 in the last hearing on December 6 --

22 THE COURT: Hold on a second. Can you just move  
23 over a little bit so I can -- that's okay. Go ahead.

24 MR. KENNER: Thank you. Based on the Government's  
25 submission, ECF 780 at Page 6, Footnote 2, the Government has

1 effectively conceded that the only traceable funds from this  
2 case that went to Ken Jowdy and Diamonte [ph.] or any Diamonte  
3 entity was the \$350,000 that I had told the Court that  
4 originated with Owen Nolan and that Mr. Jowdy had, in fact,  
5 settled for back in '08. I know there was some colloquy about  
6 whether or not the agreement had any relative nature or if  
7 there was an agreement at all between Mr. Jowdy and Mr. Nolan.  
8 And on that same Page 6 at ECF 780 the Government in very  
9 selective language said there wasn't a specific language  
10 agreement, as I had suggested. Now, again I'm just speaking  
11 from what I was told ten years ago during our arbitration.

12 But what I was able to find, and you'll find it in  
13 my ECF submission 790, Exhibit A, on Page 5 of this -- of the  
14 exhibit, . = is language that confirms that Mr. Nolan did have a  
15 separate agreement with Mr. Jowdy where it says:

16 "Whereas, plaintiff's counsel and the parties have  
17 made aware that Ethan Monroe, Owen Nolan and Joe Juno  
18 [ph.], all of whom were also Kenner clients, never filed  
19 or participated in any Kenner initiated legal proceedings  
20 and complaints against Jowdy or any Jowdy controlled  
21 entities; and (b) entered into prior separate settlement  
22 agreements with Jowdy and/or Jowdy-related entities as  
23 the result of our litigation."

24 THE COURT: Well, again, settlement agreements are a  
25 different issue that I don't -- I want to stay focused on this

1 issue regarding the resort. And again, I -- what footnote are  
2 you referring to?

3 MR. KENNER: On -- the Government -- I believe it  
4 was the Government's submission 780.

5 THE COURT: What -- yeah.

6 MR. KENNER: Page 6. I believe it was Footnote 2.  
7 And what they're basically --

8 THE COURT: I don't -- I don't -- and the Government  
9 can correct me if I'm wrong -- I don't believe the Government  
10 has conceded that only \$350,000 of the victim's money went to  
11 the resort. I don't know where that's coming from.

12 MS. O'CONNOR: We do not concede that.

13 THE COURT: Yeah, I don't -- that doesn't say that  
14 on Page 6. I have Page 6 in front of me. All the footnote  
15 talks about is regarding the money judgment. Doesn't even  
16 have an amount. So --

17 MR. HAGGANS: The money judgment, Your Honor, the --  
18 that language I believe is related to -- if I may just find  
19 it -- it was the -- during the December 6 transcript at  
20 Page 19 and 20, I had told the Court that the Government did  
21 trace all of the money in this case that had gone to Mr. Jowdy  
22 or any Jowdy --

23 THE COURT: Let me just ask. Then what's -- I don't  
24 know if you have this num -- what's the Government's position  
25 regarding how much money went to Mr. Jowdy or the victim's



1 money approximately?

2 MS. O'CONNOR: Your Honor, I wouldn't be able to say  
3 offhand, but the Government's position is, is it's ultimately  
4 irrelevant because the Government is seeking forfeiture of the  
5 resort in its entirety.

6 THE COURT: I know. I understand that, but I  
7 just -- I don't want to get into a dispute about how much it  
8 was. But at least my memory is it's significantly -- right,  
9 more than \$350,000?

10 MS. O'CONNOR: In the overall scheme it would be a  
11 minimal amount.

12 THE COURT: All right.

13 MR. KENNER: Your Honor, with the Government during  
14 the forfeiture hearings Mr. Wayne had submitted while on the  
15 stand Government forfeiture of 36 which traced all of the  
16 money that went to the Cabo San Lucas resort and that was a  
17 total of \$350,000.

18 THE COURT: Oh, I'll look at the issue again,  
19 Mr. Kenner, but the Government is correct. It's -- the law is  
20 that it's still forfeitable. There's no threshold amount that  
21 must be met in order for the -- if the money goes into the  
22 property such as that, the law is that the property is  
23 forfeitable regardless of the amount.

24 So I'll go back and I'll look at it, but ultimately  
25 it doesn't affect legal analysis. All right? But -- go

1 ahead.

2 MR. KENNER: Yes, Your Honor. My point was that the  
3 \$350,000 went to Mr. Jowdy and he utilized it for his LLC.  
4 The funds were never ill-gotten for My Baja Ventures 2006,  
5 which my two partners had put all the money into that deal and  
6 no money went to CSL Properties, the other investors --

7 THE COURT: All right.

8 MR. KENNER: -- entities. And that was through the  
9 Government's own money tracing.

10 THE COURT: All right. I'll go back and look at it,  
11 Mr. Kenner, okay?

12 MR. KENNER: Yes, sir, Your Honor.

13 THE COURT: Let me just -- I know the lawyers for  
14 the bank and other entities are back there, so I'll allow them  
15 to be heard. Just state your name so we have it for the  
16 record.

17 MR. CANSTALVERIS: George Can --

18 THE COURT: Just pull the mic up.

19 MR. CANSTALVERIS: Yep. George Canstalveris [ph.]  
20 of Venerable for Danske Bank. Your Honor, again, it's  
21 unfortunate that the Government is unwilling to share the  
22 appraisal with us. It is what it is. We would hope that we'd  
23 be able to work with them. You know, we think that the law is  
24 what you've said it is. I mean, at the end of the day it's  
25 the Government pursuing this forfeiture. But pursuant to

1 their own guidance they have to take into account the net  
2 equity value of the resort including the expenses that would  
3 be anticipated and going forward with however they proceed,  
4 whether it's an interlocutory sale or any other way they  
5 intend to pull value from the resort.

6           So for us obviously it's really important as to what  
7 that value is, whether it's worth going through this continued  
8 process that frankly has just taken a lot of time. And, you  
9 know, we urge the Court to again urge the Government to sit  
10 down with us and have a conversation as to what's next. We  
11 haven't heard what's next. We've heard forfeiture of the  
12 resort but what does that mean in practicalities.

13           THE COURT: Well, I -- yeah, it's up to them whether  
14 they want to share the appraisal. I don't even know what  
15 their thinking is on that. I would think if they're trying to  
16 resolve the matter with the bank that that would be an  
17 important thing to share. And I know in the past at least the  
18 bank has said that it would be willing to offer a certain  
19 amount of money to try to resolve it. I don't know whether  
20 the -- you know, now that the Government has the appraisal,  
21 has a better sense what might be obtained overall from an  
22 interlocutory sale where that's something, they can go back to  
23 now with the bank. But my -- a lot of what I hope to  
24 accomplish I think has been accomplished in terms of the  
25 wording of the order. They have the appraisal in hand so a

1 lot of the concerns -- I mean, obviously I know there are  
2 concerns in general, but in terms of there being this big  
3 delay where nothing is going to happen, I don't think we're in  
4 that position any longer. My hope would be that when the  
5 Court enters a preliminary forfeiture order, which I hope to  
6 be soon, I won't deal with the money judgment part of it, but  
7 that the Government will immediately sit down with you and the  
8 other interested parties and try to figure out what makes  
9 sense under their own guidance for the victims and for  
10 innocent third parties. That would be my hope and obviously  
11 I'll be supervising it. Okay?

12 MR. CANSTALVERIS: Thank you, Your Honor.

13 THE COURT: All right.

14 MR. YOLINSKY: Your Honor, good afternoon. Mark  
15 Yolinsky [ph.].

16 THE COURT: Yes, good afternoon, Mr. Yolinsky.

17 MR. YOLINSKY: At this point I think there are about  
18 400 million dollars of property owners who I'm not their  
19 lawyer but they've asked me to appear today and -- but I'm  
20 speaking for myself.

21 Frankly, I'm really surprised that the Government  
22 hasn't agreed to share the appraisal. I thought that was a  
23 given that in order to move the ball forward everyone would  
24 get a chance to see -- at least interested parties would get a  
25 chance to see it.

1           And the reason why it's important to see it is  
2 because we -- we, speaking for myself and the other  
3 homeowners, we need to know whether we're talking about a  
4 dollar of equity or a meaningful amount of equity. If it's a  
5 dollar or even ten million dollars, when you factor in the  
6 sales commission and the fact that the property is going to go  
7 cash flow negative starting this May, there may not be equity  
8 and that's a really important issue for us.

9           I think, Your Honor, once you entered this order of  
10 forfeiture we're heading into a sales process that in the best  
11 of circumstances is going to take a year and probably is going  
12 to take 18 months to sell property of this magnitude and this  
13 property is going to go cash flow negative in that time frame  
14 with no assurance that it's -- with no source of funds to keep  
15 it running and that really hurts the homeowners. So, Your  
16 Honor, just to say that there is equity without giving a sense  
17 of the amount of equity is really extremely unsatisfying to  
18 us.

19           The other thing that has not been discussed is the  
20 basis for the appraisal. I advised the Court in a prior  
21 letter that the homeowners were planning to have a homeowners'  
22 association meeting to adopt a resolution, which we then did  
23 limiting the development of the property to the existing  
24 master plan. If the appraisal was done on some other basis  
25 then we believe the appraisal is invalid. And frankly, if it

1 was done on some other basis we're going to -- we may feel  
2 that we need to institute litigation in Mexico, which is again  
3 counterproductive to everything Your Honor is trying to  
4 accomplish. What should come out of this process is some  
5 resolution, not continued -- not another front of litigation  
6 in Mexico which, you know, to protect our interests, as Your  
7 Honor really correctly pointed out, we would have to do.

8           So the idea that this is going to go forward in  
9 secrecy without people having some assurance that there really  
10 is a there -- there is -- is very dissatisfying. And I hope  
11 Your Honor -- I understand the legal parameters that guide  
12 Your Honor, but I hope as an equity and practical matter Your  
13 Honor will prevail on the Government to disclose the appraisal  
14 to the people who are directly affected by it and that's my --  
15 my request. Thank you, Your Honor.

16           THE COURT: All right. Again, I -- there's no legal  
17 basis for me to require the Government to disclose that  
18 appraisal. I understand what you've said but for purposes of  
19 today I hope the Government will take what they've heard and  
20 consider it. And, you know, as I said, when this preliminary  
21 order gets entered I plan to keep this on a very tight rein to  
22 make sure that these issues are resolved as quickly as  
23 possible. At some point I may ask the Government -- I'm not  
24 going to ask them to do that today because they just got this  
25 appraisal -- to articulate to me, you know, what the basis is

1 for not -- in an effort to try to resolve this not sharing it,  
2 but I'm not going to get into that today. All right.

3 MR. YOLINSKY: Thank you.

4 THE COURT: Thank you. All right. Is there any  
5 other issues with respect to the resort?

6 MS. O'CONNOR: Your Honor, the Government would like  
7 to address something Mr. Yolinsky just mentioned. He filed a  
8 letter with the Court in December stating that he and the  
9 other homeowners took steps to adopt a resolution limiting the  
10 authority of the administrating beach estate condominium to  
11 prove any modification to the resort's master plan.  
12 Mr. Yolinsky further emailed the Government's appraiser  
13 without seeking the Government's permission to do so to  
14 instruct the appraiser to consider the impact of the  
15 resolution when performing an appraisal in determining the  
16 value of the resort.

17 The Government views these actions as a direct  
18 violation of the protective order. As Mr. Yolinsky has  
19 admitted to the Court, what he wants is something he was never  
20 guaranteed. He cannot be permitted to effect the value of the  
21 resort now in contravention of the protective order by  
22 adopting a resolution or taking other similar action. So we  
23 would request the Court to direct Mr. Yolinsky to remedy the  
24 situation at once and cease taking action and perhaps value  
25 the resort and impedes and instructs the forfeiture in this

1 case.

2 MR. YOLINSKY: At the last conference I specifically  
3 said that the -- that the homeowners were concerned if the  
4 master plan was in jeopardy. Your Honor said, "Don't you have  
5 rights?" and I said we had -- I had a call scheduled that  
6 afternoon with Mexican counsel and we were going to proceed to  
7 explore to protect our rights, which we have done in Mexico.  
8 Your Honor invited, encouraged us to take steps to protect the  
9 master plan which is what the homeowners have done.

10 THE COURT: Well, I don't -- "inviting," "encourage"  
11 I think would be a little bit strong, but certainly to the  
12 extent the Government is arguing that this was a violation of  
13 the protective order, I -- there was no discussion of that.  
14 This did come up. Mr. Yolinsky I think was clear about what  
15 he was going to try to do at the last conference and if the  
16 Government believed -- it didn't occur to me that that could  
17 be a violation of the protective order and if the Government  
18 believed that, certainly --

19 MR. YOLINSKY: And, Your Honor, just -- you know, I  
20 really --

21 THE COURT: I'm not saying it is a violation of the  
22 order. But I'm saying they didn't --

23 MR. YOLINSKY: Your Honor, I really take umbrage at  
24 this because before the homeowners meeting took place I wrote  
25 a letter advising that was in the works.



1 THE COURT: I understand that.

2 MR. YOLINSKY: And no one said at that time --

3 THE COURT: All right. But the bottom line is --

4 MR. YOLINSKY: -- that we were proceeding in  
5 violation --

6 THE COURT: -- there's nothing going on right now.  
7 This resolution was passed?

8 MR. YOLINSKY: Resolution was passed.

9 THE COURT: All right. So --

10 MR. YOLINSKY: But, Your Honor, I want to be clear.  
11 We decided to institute litigation in Mexico to im -- to  
12 protect the action it took.

13 THE COURT: No, no. What it -- I want to make  
14 clear. Instituting litigation to try to protect your rights  
15 is not a violation of the protective order, okay?

16 MR. YOLINSKY: Thank you. Good.

17 THE COURT: That's not happening. All right. But  
18 again, this just highlights what I've been saying all along to  
19 everybody involved including the Government that the best  
20 thing that can be done once the Court enters this order is to  
21 sit down with all the interested parties because having  
22 litigation with the homeowners, you know, having a sale taking  
23 18 months I don't think is in anybody's interests.

24 So again, I'm assuming the Government is going to  
25 act in a prudent and wise manner but obviously provides in the

1 whole process, all right?

2 MR. YOLINSKY: Thank you.

3 THE COURT: All right. All right. I -- do you want  
4 to talk about the money judgment part of it? And I did  
5 receive the Government's December 20th letter and Mr. Kenner  
6 and Mr. Talken responded to that. And the Government didn't  
7 put a reply in, so I do want the Government to address  
8 Mr. Talken's letter because he makes certain statements  
9 regarding what the Government is acknowledging or not  
10 acknowledging and I just want to get the Government's position  
11 with respect to that. Do you want me to ask questions or do  
12 you want to address it first?

13 MS. O'CONNOR: We're happy to address any questions  
14 you have, Your Honor.

15 THE COURT: Well, he says, for example, in the  
16 beginning of the letter the Government is tacitly  
17 acknowledging by your submission that Honeycutt applies to  
18 money laundering forfeiture under 982(a)(1). And he cites in  
19 a footnote other cases for the Government under 981(a)(1)(C)  
20 apparently is conceding that -- in cases before the circuit.  
21 So I just want to make sure I understand what the Government's  
22 current position is with regard to the application of  
23 Honeycutt to 982(a)(1).

24 MS. O'CONNOR: The Government's position is that

1 Honeycutt does not apply to a money laundering forfeiture  
2 statute, Your Honor. We never argued that it did. Our  
3 position has --

4 THE COURT: Well --

5 MS. O'CONNOR: -- always been that the laundering  
6 forfeiture statute is very different from the forfeiture  
7 statute that was addressed in Honeycutt.

8 THE COURT: Well, I think he's arguing that because  
9 the Government is now incorporating parts of Tanner, which in  
10 terms of the joint several liability issue and also because he  
11 says that Tanner also involved money laundering as -- in  
12 addition to fraud that somehow Tanner and the Government's  
13 application of Tanner here somehow is some type of tacit  
14 acknowledgment. So I don't know if you want to address that.

15 MS. O'CONNOR: Yes, Your Honor. The Second Circuit  
16 in Tanner did address the money laundering statute and  
17 forfeiture, but the courts merely stated that there are two  
18 things to note when criminal proceeds result from money  
19 laundering offenses under 1956. The court has said:

20 "The court in imposing sentence on a person  
21 convicted of an offense in violation of Section 1956  
22 shall order that the person forfeit to the United States  
23 any property real or personal involved in such offense;  
24 (2) a defendant who acted merely as an intermediary but  
25 no longer possesses the property acquired as a result of

1 money laundering may be required to forfeit substitute  
2 property, but only if the defendant conducted three or  
3 more separate transactions involving a total of \$100,000  
4 or more in a 12-month period."

5 And this is addressed by the Government during oral  
6 argument in its reply brief. The court in Tanner then stated:

7 "In that case the defendant Davenport was an active  
8 participant in the unlawful activity that his money  
9 laundering was designed to conceal rather than a mere  
10 intermediary in the money laundering scheme. But even if  
11 he fell into the intermediary category of 982(b)(2), that  
12 provision safe harbor would not extend to him because the  
13 evidence showed that he wired a total of 9.7 million in  
14 four separate transactions within a year."

15 So the Government's argument is very similar. In  
16 this case both defendants were not mere intermediaries. They  
17 were the masterminds of the money laundering conspiracy. They  
18 should be held liable for the full amount.

19 The 1956 -- the money laundering forfeiture statute  
20 is very different because it -- it addresses the concerns that  
21 Honeycutt had -- the court in Honeycutt had regarding  
22 forfeiture of proceeds. It already provides a safe harbor for  
23 the intermediary, which neither of these defendants are in  
24 this case.

25 So it's the Government's position that both

1 defendants are liable for the full amount of the forfeiture  
2 under the money laundering statute and that Honeycutt is  
3 inapplicable.

4 THE COURT: Well, let me just go back to this issue  
5 because Mister -- I'll hear from Mr. Talken in a minute, but  
6 in his response he took issue with the idea that  
7 Mr. Constantine was the mastermind of all aspects of the  
8 schemes that were at issue here. And specifically, you know,  
9 the Government is seeking about 20 million dollars in  
10 forfeiture against Mr. Constantine and Mr. Kenner. But in  
11 properties that -- I think the Government concedes that  
12 Mr. Constantine had nothing to do with and I think the  
13 Government can see there's no indication that any knowledge --  
14 I'm talking about Freylies [ph.], the Key Palm units, Del Mar,  
15 Mar Palm units, the Peca Palm units. I don't think there's  
16 any evidence they had any involvement in those or had any  
17 knowledge of those, right?

18 MS. O'CONNOR: No, Your Honor. In fact, we say the  
19 opposite. The forfeiture the Government is seeking relates to  
20 the three frauds that were proven at trial: the Hawaii  
21 investment fraud; the Global Settlement Fund -- fraud; and the  
22 Euphoria fraud. All of the proceeds that the Government  
23 traced were generated by these three frauds. The fact that  
24 the Government traced pro --

1           THE COURT: Well, first of all, I have to stop you,  
2 okay, because at the trial the Government specifically said  
3 Mr. Kenner has been focused on this in many of his submissions  
4 and it's 100 percent true that those properties came up during  
5 the trial and Mr. Miskieweicz -- I think it was a sidebar, but  
6 I remember this specifically, even though it was many years  
7 ago -- I said, "Is the Government trying to prove the fraud  
8 with respect to these?" and he said, "No, we're not seeking."

9           So that -- when you say that fraud --  
10 Mr. Miskieweicz specifically said, "Judge, we're not  
11 attempting to prove that the investors were defrauded with  
12 respect to Freylies, with respect to the Palm units or with  
13 respect to Del Mar, so I don't know why you're saying that  
14 when the Government took a different position during the case.

15           MS. O'CONNOR: Yes, Your Honor, the Government is  
16 not trying to prove any of these frauds, but the Government is  
17 trying --

18           THE COURT: Then why are you calling them frauds?

19           MS. O'CONNOR: Because that's the language that was  
20 used in their opposition papers.

21           THE COURT: So what --

22           MS. O'CONNOR: The point the Government is making is  
23 that there were the three frauds at trial and the Government  
24 traced the proceeds generated by those frauds to numerous

1 properties including Freylies, Del Mar and the lines of credit  
2 were involved, so --

3 THE COURT: Okay. So it's basically by virtue of  
4 the lines of credit that you're saying under money laundering,  
5 not fraud, right, or is it -- are you operating on the money  
6 laundering here or are you operating on the fraud?

7 MS. O'CONNOR: We're tracing the proceeds from the  
8 Hawaii -- and mainly for these properties the Hawaiian  
9 investment fraud. For example, for Freylies --

10 THE COURT: No, let's focus on Mr. Constantine for a  
11 minute. What evidence is there that Mr. Constantine knew with  
12 respect to Hawaii, okay? Obviously there's -- you can correct  
13 me if I'm wrong -- I think it was one million dollars he  
14 received. He's shaking his head no. One million dollars that  
15 the Government says he shouldn't have received that were  
16 victims with respect to Hawaii and then there's the Centrum  
17 [ph.] loan and the urban expansion loan wherein the Government  
18 is saying he received money for both of those things as well.  
19 Right?

20 MS. O'CONNOR: Yes, Your Honor. Your -- the  
21 Government's position is that Constantine by virtue of his  
22 role as a co-conspirator in these -- in the conspiracy, the  
23 wire fraud conspiracy, he is liable for the full amount of  
24 proceeds generated by the frauds. And Your Honor found --

25 THE COURT: What evidence is there that

1 Mr. Constantine knew beyond what I just talked about, beyond  
2 his involvement in the Centrum loan, the urban expansion loan,  
3 and the one million dollars he received, what evidence is  
4 there that he knew anything about any of the other lines of  
5 credit or what Mr. Kenner was doing with anything else related  
6 to the lines of credit, other than those three things? What  
7 evidence is there of that?

8 MS. O'CONNOR: Your Honor, Rule 29 and 33 decision  
9 found in so many words that Constantine was the mastermind of  
10 the three frauds that were proven at trial. To quote, Your  
11 Honor, the witness's testimony and documentary evidence  
12 adduced at trial sufficient established that Constantine  
13 agreed with Kenner to participate in all of the objects of the  
14 conspiracy.

15 THE COURT: I know but, first of all, I didn't hear  
16 the word "mastermind" in there. Did I use the word  
17 "mastermind"?

18 MS. O'CONNOR: Not that exact phrase, Your Honor.

19 THE COURT: Okay. Then what I was --

20 MS. O'CONNOR: Right.

21 THE COURT: -- talking about there were the  
22 particular things that I just talked about. I made a ruling  
23 that Mr. Constantine was involved in all three of the frauds:  
24 GSF fraud, the Euphoria fraud, and the Hawaii fraud. But I  
25 didn't make a ruling -- I did not make a ruling that



1 Mr. Constantine was involved in or knew every aspect of what  
2 was going on with respect to the lines of credit and the  
3 Hawaii money. I didn't make any ruling on that. That  
4 wasn't -- the jury didn't have to find, in fact, that it  
5 wasn't even offered to them. There's no argument made to them  
6 that Mr. Constantine knew about all the lines of credit and  
7 all the monies that were going. That argument wasn't even  
8 made because there's no evidence of that. And that's what I'm  
9 asking you and you haven't pointed to any evidence by any  
10 witness or any document that Mr. Constantine was aware of all  
11 the lines of credit.

12           So you're saying he was the mastermind of this --  
13 what would amount to the victims' lines of credit is six  
14 million dollars, 6.2 million dollars. And then all those  
15 other properties that I just told you about where -- where  
16 parts of the lines of credit went, that he's responsible for  
17 all those things even though there's not any evidence that  
18 Mr. Constantine had any knowledge of the existence of those  
19 investments or the lines of credit that funded those  
20 investments, and I find that remarkable. That was my whole  
21 point in asking the Government to brief this issue and all I  
22 got back was he's a mastermind of the whole thing with no  
23 cites to the record.

24           So I'm persuaded that there's any evidence that  
25 Mr. Constantine knew about all these other lines of credit and

1 all the money that went to those properties. And I'm  
2 unpersuaded that that should be something that he should be --  
3 a forfeiture money judgment as having been either involved in  
4 for purposes of money laundering or for purposes of fraud. I  
5 remain unconvinced, but I'm giving you an opportunity to  
6 explain to me what evidence I'm missing.

7 MS. O'CONNOR: Your Honor, the Government's position  
8 is based on the law which finds that the Government does not  
9 have to show that Constantine obtained every penny personally.  
10 Because he was -- he played in Your Honor's exact terminology,  
11 an integral role in the Hawaii fraud. He encountered --

12 THE COURT: But in only one aspect of the Hawaii  
13 fraud. That's the whole -- the whole point. I understand.  
14 I'm not holding you that he had to have personally obtained  
15 it. I'm holding you to that he had to -- he had to know of  
16 its existence. He had to know of its existence. How could he  
17 be held responsible for proceeds, be it money laundering or  
18 fraud, when the Government has no evidence that he even knew  
19 of the existence of the money?

20 MS. O'CONNOR: Your Honor, the courts don't require  
21 the Government to show every dollar was seen -- was known by  
22 him or obtained by him personally.

23 THE COURT: I -- you keep repeating that. I'm not  
24 arguing with you about that. I'm not saying he had to obtain  
25 it personally. He has to know that Mr. Kenner had the money

1 and was doing something with that money, either from a fraud  
2 standpoint or money laundering standpoint, right?

3 MS. O'CONNOR: Your Honor, the Government doesn't  
4 have to show that he knew about every specific dollar. The  
5 hypothetical by the -- the Supreme Court's hypothetical in  
6 Honeycutt discusses a hypothetical farmer mastermind who uses  
7 low-level individuals to obtain money. The farmer himself  
8 doesn't actually acquire that money. He uses his low-level  
9 individuals in the conspiracy to obtain the money.

10 It's a similar concept here. The court wouldn't  
11 require the Government to show that every person retained  
12 money on behalf of the farmer, that the farmer knew that  
13 occurred. This is a large scheme over several years in which  
14 the two defendants worked together. The scheme was well  
15 known. He was -- they participated together --

16 THE COURT: What point to the record the Government  
17 has any awareness that Mr. Constantine had as to a larger  
18 scheme beyond the three things that we've talked about, which  
19 is the money that he got from the Hawaii investment and  
20 Centrum and the urban expansion loan. What evidence is there  
21 that Mr. Kenner or anybody else told him that there were all  
22 these other lines of credit out there and that Mr. Kenner was  
23 making all these other investments or doing anything with  
24 respect to any other money other than what Mr. Constantine was  
25 involved in?

1           These cases that you're citing are different  
2 scenarios whereas someone who's at the top of it was aware,  
3 whereas what I'm suggesting to you is there's no evidence that  
4 Mr. Constantine was overlooking with Mr. Kenner these lines of  
5 credit more broadly and had an understanding of all these  
6 other things that Mr. Kenner was doing.

7           MS. O'CONNOR: Your Honor, I understand what you're  
8 asking and our position is that under the law the Government  
9 can't possibly show that each defendant knew of every single  
10 movement of the co-defendant. There was a general  
11 understanding that they had this -- that they had this scheme  
12 together. The lines of credit were established to fund the  
13 Hawaii development project. The proceeds stem from Hawaii  
14 fraud in which Constantine played the integral role. Each  
15 defendant whacked up duties. There are only so many hours in  
16 the day. Each one had a role in it. But generally speaking,  
17 these two defendants conspired together to defraud victims in  
18 the Hawaii development project.

19           So the fact that Constantine may not have known  
20 about the line of credit money *per se*, but was involved in  
21 another aspect, it was certainly foreseeable to him. Their  
22 entire scheme was based upon representing the investors that  
23 their money would be used to develop the project in Hawaii, to  
24 steal money and then diverting it for their own purposes. And  
25 that line of credit money was withdrawn and used for both of

1 their purposes.

2           The money was commingled in the Luao Four [ph.]  
3 account, moved to the Ula Makika account, and then moved to  
4 other properties. There's -- the extensive commingling alone  
5 makes it impossible for Constantine to assert that he didn't  
6 receive any of the line of credit proceeds. So in a case like  
7 this, it's a burden that the Government is showing because of  
8 his role with Kenner that they designed this scheme together,  
9 each one had jobs. There's only so many hours in the day, but  
10 at the end of the day he received the benefit of it.

11           He was aware of the scheme and even if the  
12 Government can't possibly prove that he knew every single  
13 aspect of what Kenner was doing, he still was aware of the  
14 scheme, participated and benefitted from it.

15           THE COURT: Okay. I disagree. All right. There's  
16 no -- and again, I've given the Government multiple  
17 opportunities to point to me the evidence that Mr. Constantine  
18 was aware of this broader scheme with respect to Hawaii. He  
19 was aware of the things that I've cited. There's evidence of  
20 that at the trial and that's what I think the jury found him  
21 guilty of.

22           To the extent the Government is arguing that  
23 Mr. Constantine was broadly aware of the other -- all these  
24 lines of credit and things that Mr. Kenner was doing with  
25 respect to the lines of credit, the Government has failed to

1 cite any evidence of that. I'm aware of no evidence of that  
2 and I don't believe -- the Government keeps saying, you  
3 keep -- you're setting up a straw man. The Government can't  
4 possibly have to prove that he knew where every dollar went.  
5 I'm not suggesting the Government has to prove where every  
6 dollar went. But the Government does have to prove that he  
7 was aware of the broader scheme and the Government has failed  
8 to do that. Okay.

9 So Mr. Talken, if you want to add anything on that.

10 MR. TALKEN: I have nothing to add to that. The  
11 only discussion I'd like to have just very briefly is where  
12 you started talking about Honeycutt and money laundering. I  
13 remember when we had one of the many oral arguments we've had  
14 and that's one of the things you said to me was, I hear you  
15 about -- you know, we know that Honeycutt applies -- is based  
16 in -- is founded in the drug forfeiture statute. You sort of  
17 agree with me that you can see how it's heading towards being  
18 applied to the fraud statutes, but you said to me, cite me  
19 some authority as to how it goes to money laundering.

20 And I think that we have that cite in Tanner because  
21 it's clear that if they weren't con -- and they even talk  
22 about, they even said, you know, their hedged their bets a  
23 little bit in here and even saying in Tanner, look, it's still  
24 unclear how it applies to how money laundering and Honeycutt  
25 interact, but it's important that in this money laundering

1 case what the Court of Appeals didn't say is no, it's moot.  
2 We're dealing with the money laundering case here. Honeycutt  
3 doesn't apply. So why are we writing this 15 to 10-page  
4 opinion.

5 THE COURT: I don't think you can read -- read that  
6 into -- the failure to say that sometimes the circuit just  
7 avoids dealing with an issue they don't have to deal with and  
8 they basically found because those defendants were involved  
9 in -- or mast -- I don't know if they used the term  
10 "mastermind," but basically the facts of that case didn't  
11 require them to make the conclusion that -- I think it's still  
12 undecided.

13 MR. TALKEN: I --

14 THE COURT: I can't read Tanner to say the Second  
15 Circuit has implicitly by -- looking at the evidence more  
16 closely conceded that Honeycutt applies to 920 -- 982(a)(1).  
17 But -- and I just think the language of 982(a)(1) is  
18 different, obviously.

19 MR. TALKEN: We agree that the language is  
20 different, but the point I had made was really the underlying  
21 concept of why Honeycutt exists is entirely the same. The  
22 concept is very simple. You know, making people forfeit what  
23 they didn't gain is inherently unfair and it -- it's really  
24 not based in the equities. And this is a very -- I agree with  
25 Your Honor they don't state that money -- that it applies to

1 money laundering, but I also think it's a little above where  
2 you said. I think that they really do enter into an analysis  
3 of Honeycutt in this money laundering case. And by -- and by  
4 doing that, they have indicated that it's heading that way and  
5 I --

6 THE COURT: Well, it may -- the other thing is, how  
7 in viewing the forfeiture issue in this case it relates to the  
8 money judgment. It may moot out some of those issues because  
9 if I ask the Government to revise the numbers to reflect  
10 things that Mr. Constantine was personally involved in,  
11 these -- some of these Honeycutt issues would go away.

12 MR. TALKEN: I agree and then that's why I didn't  
13 address them and in your point, you know, I'm abiding by rule  
14 one because I understand where we are in this. I just wanted  
15 to --

16 THE COURT: Okay.

17 MR. TALKEN: That small issue I just think is  
18 important to discuss because --

19 THE COURT: All right. Well, and I'll --

20 MR. TALKEN: -- it may be a fall-back position at --

21 THE COURT: All right. And it's preserved.

22 Obviously --

23 MR. TALKEN: -- at a later time.

24 THE COURT: Obviously you can -- you preserved the  
25 argument that Honeycutt should apply in the first instance,



1 but again, it may be mooted out if -- if, in fact, what I  
2 for -- ask Mr. Constan -- what I require Mr. Constantine to  
3 forfeit in terms of a money judgment or things that he was  
4 personally involved in. All right.

5 MR. TALKEN: And that's all I have to add. It's  
6 just making that portion of the record clear --

7 THE COURT: All right.

8 MR. TALKEN: -- from our side.

9 THE COURT: Mr. Kenner, I'll allow you to briefly be  
10 heard on this issue.

11 MR. KENNER: Thank you, Your Honor. I just wanted  
12 to raise that the Government through Agent Petrolisia [ph.],  
13 3934 of the transcript, did confirm Mr. Constantine was paid  
14 approximately one million dollars and the back tracing on  
15 those funds, none of the money comes from any of the  
16 individuals in the superseding indictment.

17 And to reiterate the other point was that with  
18 respect to the monies that did come from superseding  
19 indictment individuals that went through Mr. Jowdy as part of  
20 his loans was 1.315 million. That takes into consideration  
21 the fact that Mr. Peca was one of those individuals who said  
22 at trial he was aware of the loans and authorized them.  
23 Mr. Berard also at trial, I think at transcript 3055, also  
24 said that I had -- he was aware of the loans and I had told  
25 him just like he had previously testified six years prior and

1 in arbitration.

2 Under Tanner I just wanted to add, Your Honor, that  
3 the one -- the one item that I continue to read into the  
4 Honeycutt issues that continue to emerge in the different  
5 circuits as well as Tanner is that joint and several  
6 forfeiture of a co-conspirators applies only to co-  
7 conspirators who never possessed the tainted properties of  
8 their crimes. And as far as the Government prosecution of  
9 this case and clearly through at least 2017, two years after  
10 trial, the Government only alleged that Mr. Constantine and I  
11 were co-conspirators. It wasn't until I believe Ms. O'Connor  
12 through she was losing her -- some of her forfeiture and/or  
13 money judgment nexus that she addressed that she believed  
14 Mr. Jowdy was now a co-conspirator in the case years after the  
15 case.

16 In fact, when Probation made their submission on  
17 July 18th they referred to Mr. Jowdy as a victim witness in  
18 their pleading. And on page 1 actually -- although they  
19 preferred to Mr. Jowdy and Mr. Kaiser and Mr. Kaday [ph.] as  
20 having given testimony for an obstruction issue with me, at  
21 those forfeiture hearings we know that none of those three  
22 individuals gave testimony. So I don't know where they got  
23 the basis for this, but they continued to -- Probation  
24 continues to refer to Mr. Jowdy deep into 2016 as a victim of  
25 this case as opposed to playing any other role.

1           And lastly, in Nicolo, 597 F.Supp. 2(d), 342 from  
2 Second Circuit 2009, they do refer to property traceable to  
3 these property acquisition of which is attributable to the  
4 money laundering scheme, rather than some money obtained from  
5 untainted sources.

6           And again, I just wanted to reiterate to the Court  
7 that if you could just refer my partner Joseph Stumple's  
8 letter to the Court, ECF 771, where he refers to having paid  
9 for 70 percent of Baja Ventures and he refers to our other  
10 partner Uri Letnin [ph.] as having paid for the other 30  
11 percent of Baja Ventures. There are zero ill-gotten gains  
12 traceable to the Baja Ventures, LLC.

13           The money that goes to Mr. Jowdy from this instant  
14 case is the 1.315 million from the five individuals that were  
15 in the case that had lines of credit. There are some issues  
16 with each one, but as a maximum number that's how much money  
17 from the superseding indictment individuals went to Mr. Jowdy.

18           Also from -- I just wanted to make it clear for the  
19 Court Mr. Constantine was not involved in the Centrum loan  
20 whatsoever. He played no role in that. Mr. Constantine got  
21 involved after Centrum was involved in our -- in our company  
22 already lending money for the Hanawapo [ph.] deal that  
23 Mr. Manfredi had negotiated.

24           THE COURT: All right. All right. Thank you,  
25 Mr. Kenner.

1           So with respect to the forfeiture, what I'm going to  
2 ask the Government to do is submit a revised chart to me  
3 similar to what you did way back when you did your initial  
4 forfeiture brief where you went through each property, the  
5 proceeds, and then deducted double-counting to come up with  
6 your money judgment. I want you to give me a revised chart.  
7 I'm going to go look up some of the issues that we discussed  
8 but in order not to have additional delay I want to have all  
9 the potential options available to me with -- and obviously  
10 the -- it's important that we make sure there's no double-  
11 counting.

12           So for purposes of Mr. Constantine, what the numbers  
13 would be if what was included as related to him was the money  
14 that he received from Hawaii, which I think was approximately  
15 one million dollars, whatever that amount is, the urban  
16 expansion money and then the Centrum loan money and, again,  
17 I'll get to that issue, Mr. Kenner, that you just raised, but  
18 I want to have the numbers available to me, and then any other  
19 Eufora money and then the CSF money.

20           And then for Mr. Kenner I want the same chart but  
21 his should obviously be broader; should go: GSF, the lines of  
22 credit, the Hawaii investment money, Eufora, Centrum. You  
23 know, I think I said the urban expansion thing, but I think  
24 for purposes of forfeiture that's not in there. I may have  
25 made a mistake on that, right? I don't think that was in the

1 Government's chart, right?

2 MS. O'CONNOR: I don't believe so, Your Honor.

3 THE COURT: All right. So take -- so  
4 Mr. Constantine it's Centrum, Eufora, GSF, the money he got  
5 from Hawaii, and that's it.

6 And for Mr. Kenner, it's GSF, the lines of credit,  
7 the Hawaii investment money, Eufora and Centrum. That -- you  
8 understand what I'm asking?

9 MS. O'CONNOR: I do.

10 THE COURT: And then obviously make sure there's no  
11 double-counting and I want to see what those numbers are. All  
12 right. And I don't know how -- it's really just math. Can  
13 you get me that in a few days? What -- how long would that  
14 take?

15 MS. O'CONNOR: By next Friday, Your Honor?

16 THE COURT: How about a week from today? A week  
17 from today? And then I'll give the defendants a week to  
18 respond to that chart. I don't want any additional argument  
19 at this point. I just want the numbers. Okay. I think both  
20 sides have briefed these issues sufficiently for me to make a  
21 decision. All right. My hope would be that the forfeiture  
22 decision will come out shortly thereafter, two weeks from  
23 today.

24 All right. Let's move to the -- everybody okay to  
25 continue? Do you need a five-minute break or are you okay to

1 keep going? Everybody is good?

2 MR. HAGGANS: I -- Your Honor, with the Court's  
3 indulgence, I did have a 2:30 appearance scheduled in another  
4 matter. So depending on how we could -- we could perhaps take  
5 a break at that --

6 THE COURT: That's good.

7 MR. HAGGANS: I think that appearance may be as much  
8 as half an hour, but we may be done by then.

9 THE COURT: Who's that before?

10 MR. HAGGANS: It's for Magistrate Judge Tomlinson,  
11 Your Honor.

12 THE COURT: Okay.

13 MR. HAGGANS: It's a guilty plea in a different  
14 matter.

15 THE COURT: All right. So why don't we see how long  
16 this takes. We'll keep going at least till 2:30 and then  
17 we'll see -- and then we'll figure out what to do.

18 MR. HAGGANS: All right. Thank you, Your Honor.

19 THE COURT: All right. Go ahead, Mr. Talken. So  
20 again, my hope is not that you go through every last detail of  
21 your submissions but just highlight anything you want to  
22 highlight with regard to objections. Okay.

23 MR. TALKEN: Thank you, Judge. I'll -- for that  
24 reason I'm not going to get into the loss amount. I think  
25 there's been a lot of --

1           THE COURT: Well, actually, I'm glad you raised  
2 that, though.

3           MR. TALKEN: -- filing and concessions by the  
4 Government.

5           THE COURT: I need to ask the Government because I  
6 do then want the Government to revise the loss amount for --  
7 because that will be a different number than the forfeiture  
8 amount. So the loss amount should be revised to reflect that  
9 as well. Do you understand what I'm saying? For purposes of  
10 the guidelines calculation, I think what's going to end up  
11 happening is it's going to be the 3.5 and nine-point -- right  
12 now it's over 9.5 so I think it's going to go --

13           MR. TALKEN: Two-point difference.

14           THE COURT: Two-point difference. Okay.

15           MR. TALKEN: And I'll just react to that when --

16           THE COURT: Okay.

17           MR. TALKEN: -- it happens. That's fine. That's  
18 how we'll deal with that.

19           THE COURT: All right.

20           MR. TALKEN: And I think that's the length of this  
21 discussion.

22           In my letter of September 25th of last year I  
23 concentrated on a few of the enhancements and they're concrete  
24 or discrete enhancements and I just want to talk about those  
25 briefly.

1 THE COURT: Okay.

2 MR. TALKEN: The obstruction of justice found in  
3 paragraphs 45 through 48, 57, 66 and 73 of the PSR. It's  
4 based on really three levels of conduct alleged by -- three  
5 pieces of conduct allegedly committed by Mr. Constantine that  
6 rises to the level of obstruction of justice, the first one of  
7 which is his discussion during the trial with Mr. Kenner about  
8 questions he was going to ask when Kenner testified. That's  
9 not obstructive conduct at all. There's no evidence that  
10 there was any hint of manipulating the answers, of telling him  
11 what he should say, telling him what he shouldn't say.

12 Nowhere in any of the many filings on this case or  
13 during the record Your Honor dealt with this fairly  
14 extensively during the trial. There was a long sidebar if not  
15 a hearing about this. And nowhere in there is there any  
16 allegation that in him -- in Mr. Constantine asking Mr. Kenner  
17 what the questions were that there was anything untoward.

18 Additionally, it was first discussed with his  
19 lawyer. He spoke to his trial counsel and let his trial  
20 counsel knew he was going to do that and then everything blew  
21 up in the courtroom once that Mr. Kenner's counsel brought it  
22 to the Court's attention. But that certainly doesn't rise.  
23 That's just -- that is perfectly admissible conduct and cannot  
24 serve as the basis of an obstruction of justice enhancement.

25 Similarly, there's the allegation that



1 Mr. Constantine in pretrial filings through his attorneys made  
2 false allegations against the Government mostly talking about  
3 how some of the evidence was withheld from him. When he made  
4 those allegations through his attorney there was no evidence  
5 that he didn't truly believe those allegations. The  
6 Government takes issue with them and I understand that they  
7 take issue. That's not a ridiculous approach to take to it,  
8 but taking issue with it doesn't mean that it's obstructive  
9 conduct. You have an individual who honestly believes that  
10 the Government is not giving him information that he's  
11 required to be given. That's not obstruction of justice.  
12 Bringing that to the Court's attention is not obstruction of  
13 justice and is actually very chilling that for a defendant to  
14 accuse the Government of misconduct is -- will be the basis of  
15 obstruction of justice enhancement because obviously he has or  
16 any defendant has a right to bring that up if they honestly  
17 believe that they're not getting what they're entitled to.  
18 Mr. Constantine possessed such an honest belief and obviously  
19 that is not a proper grounds for enhancement for obstruction  
20 of justice.

21 And finally and probably the most baffling of the  
22 grounds is this -- these emails that were allegedly fabricated  
23 by Mr. Constantine during the trial. The idea that these  
24 emails were fabricated has no founding in fact. There is not  
25 a single piece of evidence that has been presented to this

1 court during the trial or afterwards that these emails were  
2 fabricated.

3           And most importantly, the emails that they're --  
4 that they talk about in this -- in the PSR, which is the  
5 information provided by the Government, are talking about  
6 emails that are totally unrelated to the emails at trial that  
7 are alleged to have been fabricated. This individual Rosser  
8 [ph.] didn't even testify about Hawaii. However, in the PSR  
9 they're talking about how Mr. Constantine fabricated Rosser's  
10 emails about Hawaii. It just shows you how convoluted, how  
11 confusing and how unfair some of the record in this case is  
12 against Mr. Constantine.

13           There -- they are -- they are taking two separate  
14 incidents, combining them into one, putting them in front of  
15 Probation without any foundation whatsoever and asking this  
16 court to base an enhancement to increase the sentencing  
17 guidelines on that without a single piece of supporting  
18 evidence.

19           And as I said in my letter, it was real easy.  
20 Government does it all the time. All they had to do was  
21 subpoena Google, find out where these emails are and see  
22 whether they existed or didn't exist and they didn't do that  
23 and there's no evidence that it existed. And, Your Honor, I  
24 suggest to you that if they did do that, and it's my  
25 understanding that Mr. Constantine during the trial or shortly

1 thereafter before as counsel was able to -- was offered his  
2 password to let the Government do that, there was nothing  
3 fabricated. There was no emails fabricated. It was sitting  
4 here at the trial table.

5           So I don't see how in the world that has risen --  
6 could -- has risen to the level of the preponderance of  
7 evidence to allow that to support an obstruction. So those  
8 are the three bases upon that and all three of them didn't  
9 exist or were unfounded.

10           THE COURT: All right. You want to move to the next  
11 enhancement?

12           MR. TALKEN: The next one is the offense -- the  
13 paragraphs 29, 62 and 120 that the offense involved a  
14 misrepresentation during a -- excuse me -- that the offense  
15 involved a misrepresentation or other fraudulent action during  
16 the course of a bankruptcy proceeding. This offense didn't  
17 have anything to do with a bankruptcy proceeding. And going  
18 back to the record Your Honor -- I know it was a long time  
19 ago, but you may remember this sentence from the Government  
20 when you asked them, "Are you alleging any bankruptcy fraud?"  
21 and the Government said, "No, we're not."

22           This case had nothing to do with it. They made an  
23 allegation in order to attack Mr. Constantine's credibility  
24 and maybe his intent in general. I'm not exactly sure how it  
25 was admitted or why it was admitted, but it was without

1 objection that he didn't say --

2 THE COURT: Do you have the cite to the record for  
3 that?

4 MR. TALKEN: Where he said that?

5 THE COURT: Yeah.

6 MR. TALKEN: I do if -- I can find it.

7 THE COURT: Yeah.

8 MR. TALKEN: I'll -- I mean, I don't --

9 THE COURT: Send it -- just send it to me.

10 MS. O'CONNOR: Sure.

11 THE COURT: Okay.

12 MR. TALKEN: But that was said. And importantly,  
13 it -- even if that wasn't said, this case has nothing to do  
14 with it. That was a small point during a small examination  
15 that was tangentially relevant to an examination in this case.  
16 What it was irrelevant to was the frauds in this case or the  
17 facts of this case and that's why there's no way that that  
18 enhancement is applicable in this case.

19 You know, also getting into what it said was  
20 actually fraudulent to the bankruptcy -- during the bankruptcy  
21 proceedings whether or not what -- what he said was -- what he  
22 actually said and what the Government allegedly said, there  
23 are several words that are different that make a difference,  
24 but I don't think we need to get into the specifics of that as  
25 far -- yeah, if Your Honor agrees with me on the first point,

1 you don't need to get to the second point.

2 THE COURT: Why don't you just give me 30 seconds on  
3 that?

4 MR. TALKEN: Well, the 30 seconds on that is that  
5 Mr. Constantine said during the deposition in the bankruptcy  
6 proceedings that Eufora is worthless. And what he said was,  
7 "At this point in time it has no value" --

8 MR. CONSTANTINE: No, opposite.

9 MR. TALKEN: Sorry. One second.

10 [Pause in the proceedings.]

11 I'm sorry. He said that it has value but it wasn't  
12 profit. I mean, those are -- you know, it's a very important  
13 distinction and even -- even if you take that worst case in  
14 the light least favorable to Mr. Constantine it still has  
15 nothing to do with this case.

16 THE COURT: All right. What's the next enhancement?

17 MR. TALKEN: And the next enhancement is the  
18 leadership and the role. And it's a difficult -- and Your  
19 Honor kind of touched on a lot of these issues when we're  
20 talking about forfeiture and I understand that mastermind, as  
21 they talked about in Honeycutt, is different than the  
22 guidelines, role and leadership, but there are two issues that  
23 I think are important to this enhancement.

24 First of all, one, if it does apply it should be the  
25 two points, not the four points because you don't have five or

1 more participants. And I laid out clearly and Your Honor well  
2 knows what the participants are and what they aren't.  
3 Participants aren't innocent individuals that are involved in  
4 the activity. There has to be some criminal knowledge or some  
5 knowledge that something was untoward going on by those  
6 participants. They don't necessarily have to be guilty of a  
7 crime, but they have to have some knowledge that a crime is  
8 being perpetrated to become a participant at a minimum and  
9 there is no evidence that there was that many people involved  
10 that had that knowledge, the requisite knowledge of the  
11 enhancement.

12 I think the more -- the other important aspect is,  
13 was he. Even if there were that many people involved, which  
14 there weren't, should even get the two-point enhancement for  
15 being an organizer leader. It's a 6,000-page record and it's  
16 hard to parse out. There was many different aspects or  
17 tentacles of the fraud and each one had different conduct  
18 committed by -- allegedly committed by Mr. Constantine that  
19 brought him guilt into that and why the jury found him guilty.  
20 As Your Honor noted, importantly some of them he had nothing  
21 to do with, so he certainly isn't an organizing leader of  
22 that.

23 As to focusing on Global Settlement Fund which is  
24 one where that the Government brought out probably the most  
25 during the trial, it's a very -- financially it's a small

1 portion of the fraud and the overall fraud in this case that  
2 he's being held accountable for. And he had a role -- he had  
3 an active role in it and we're not disputing that. He  
4 certainly talked to the victims that -- and they testified to  
5 that. And he certainly made representations to the victims  
6 and they testified about that, although some of the emails  
7 we've talked about have brought -- excuse me, the text that we  
8 talked about have brought that into question but that's a  
9 different issue.

10 But even accepting all of that conduct, that doesn't  
11 rise to the level of organizer or leader. He was an active  
12 participant. He was, if you compare it both in this fraud and  
13 importantly as the case law requires you can compare it to  
14 other frauds of a similar nature. His role was -- was not  
15 that of a manager or a leader. And then if you take it -- the  
16 overall fraud, the fraud conspiracy he was convicted of, and  
17 the overall fraud to apply that enhancement to the fraud  
18 conspiracy, he certainly had a -- I would contest that his  
19 role was very most squarely in the middle of no enhancement,  
20 no reduction applicable because his conduct did not  
21 demonstrate all of those classic hallmarks of leadership or  
22 organizer, recruitment, control over a lot of the decision-  
23 making and so forth.

24 Now, I think that when you -- we talk about Global  
25 Settlement on its own, he certainly rose to a higher and with

1 more responsibilities, but he did not give rise to the  
2 responsibilities of that of an organizer leader. And then  
3 when you take that little subset in the big picture, there's  
4 no way in the world he was an organizer and leader of the  
5 overall fraud. And that's why that enhancement shouldn't be  
6 applicable to him.

7 And that's -- those are really basically all the --

8 THE COURT: All right. Thank you.

9 MR. TALKEN: And the only other thing, it's not --  
10 you know, there was some discussion about the sophisticated  
11 means and all of that and, Your Honor, I understand that the  
12 sophisticated means of the threshold, especially the examples  
13 that are given in the guidelines application notes are very  
14 low as far as what's sophisticated and what's not. But I  
15 think that the sophisticated -- as far as what Constantine's  
16 involvement in this was that it was -- the sophistication was  
17 lacking and it came -- it's very clear from the trial that it  
18 was lacking and many of the things that led to his conviction  
19 is because it was so unsophisticated and open and obvious.

20 So I don't think that should apply and if Your Honor  
21 does apply it, I think we'll talk about this under 3553(a)  
22 later on, but some of the quotes have kind of addressed that  
23 as almost a -- as almost an automatic tack going based on the  
24 guidelines and that the Court should consider that as 3553(a)  
25 as maybe overstating it. It's like an automatic overstate --



1 making the face offense level instead of being six almost  
2 making it a seven, in this case making it nine. So that's the  
3 other point, though I think that's probably better fit for  
4 discussion on another day.

5 THE COURT: All right. Thank you. Thank you for  
6 being so concise. All right.

7 Mr. Kenner, I'm hoping you can be as concise. Go  
8 ahead.

9 MR. KENNER: Yes, sir, Your Honor. First up, I  
10 guess I'll start with --

11 THE COURT: Just move the mic a little closer.

12 MR. KENNER: Yes, I'm sorry, Your Honor. First I'll  
13 start with leadership. The -- under the Government's -- and I  
14 know Mr. Talken had addressed the PSR issues and I think  
15 there's a number of similarities in there, but I'm just going  
16 to touch on a couple from the Government, the PSR's addendum  
17 to the pre-sentence report which actually gave them a shot at  
18 a reply to one of our first objections. I think they  
19 submitted it July 18, 2016. Under leadership, the real retort  
20 was the fact that they said that the defendants pocketed  
21 millions of dollars from the case -- from the frauds and, you  
22 know, and this may be addressed better under a loss factor.  
23 But when -- with respect to pocketing millions of dollars, the  
24 tracing of the money back to me is the repayment of two subset  
25 loans from Mr. Gaarn and Mr. Constantine of funds that

1 originated with people in the superseding indictment. There  
2 were no other traceable funds and those total a little bit  
3 less than \$280,000.

4           So 12 or 13-year alleged macro conspiracy to have  
5 Mr. Constantine repay me about 117 grand of loans that I'd  
6 given him weeks earlier and Mr. Gaarn about 160-something  
7 thousand from superseding indictment victim purchases of  
8 Eufora stock. Just doesn't seem like a leadership role the  
9 way that they're defending it.

10           In addition, you know, the guidelines are providing  
11 for an upward adjustment with the defendants, the criminal --  
12 organizer of criminal activity, of five or fewer, but it's  
13 inapplicable where there's only -- where there's only -- the  
14 only other participant in the scheme is an equal partner. As  
15 Your Honor knows under 3B1.1(c). And in any of these  
16 scenarios that I heard the Government describe at trial with  
17 respect to myself or Constantine everything appeared to be --  
18 that I -- I was managing a project in Hawaii, had investors  
19 that were under me as business management clients. And when  
20 time came to invest or do other transactions, Mr. Constantine  
21 happened to be one of the 17 hard money lenders that were paid  
22 by our corporation and the only one the Government deemed to  
23 be an illegal payment. Strangely enough, Mr. Constantine was  
24 one of only two of the 17 lenders that actually got us some  
25 money for what we were looking for.

1           You know, under U.S. v. Greenfield, 44 F.3d 1141  
2     (2d. Cir. 1995), you know, they mentioned that the defendant  
3     must have at least played a significant role in the decision  
4     to recruit or supervise lower level participants and there was  
5     no recruitment on the record of any other participants. And  
6     there's certainly no lower level administrative people in our  
7     deal.

8           In fact, with respect to Mr. Constantine's  
9     transaction, the million dollars he was paid, although none of  
10    it came from the superseding indictment individuals,  
11    Mr. Manfredi, who was the chief operating officer in Hawaii,  
12    testified at trial at Transcript 3004 that he flew to Arizona  
13    to meet specifically with Mr. Constantine before any of the  
14    consulting payments were made to Mr. Constantine.

15           So Mr. Manfredi was part of the decision to hire  
16    Mr. Constantine because neither of them knew each other when  
17    Mr3. Manfredi flew on his own to go visit Mr. Constantine  
18    ahead of the consulting payments.

19           As the FBI knows, Mr. Manfredi when he was deposited  
20    in -- excuse me, when he gave proffer in October of 2010 five  
21    years before trial, Mr. Manfredi also confirmed to the FBI  
22    that there were consulting agreements between Hawaii and  
23    Mr. Constantine for his payments and his service. Ultimately,  
24    I guess it raises another issue that I briefed the Court. I  
25    think it's ECF 8073 that Mr. Manfredi confirmed to the FBI

1 five years before trial that there were consulting agreements.  
2 Those are the agreements as Your Honor recalls are mentioned  
3 in the obstruction of justice issue that Mr. Kaiser said he  
4 never signed. They were submitted at trial, I believe, as  
5 Government Exhibit 5104. They were the photocopies of two  
6 agreements that were recovered from my Hawaii files in my  
7 office, which is where I would have expected the copies of  
8 those consulting agreements to be.

9 As Your Honor may recall, about a year before trial  
10 the Government presented those first to the court and said  
11 that they -- Mr. Kaiser's name was not forged on the original  
12 documents but they were near signatures Mr. Kaiser had left on  
13 blank documents for me and I had super-imposed those two  
14 contracts on top of his signature.

15 But perhaps unknown to the Court even through today  
16 is that a week before trial Mr. Miskiewicz brought me into  
17 this building from NBC and showed me the two original  
18 copies -- the two original ink signatures that Mr. Kaiser had  
19 recovered from his own house that he had in custody for ten  
20 years before trial.

21 On those documents it was clear that Mr. Kaiser's  
22 signature was signed over top of the printer paper, which  
23 means that it was not super-imposed as the Government had told  
24 the Court the year before the trial. But probably more  
25 distressing the fact that they used that single document --

1 those single documents as an obstruction of justice for myself  
2 and Mr. Constantine is that at trial Mr. Kaiser only  
3 authenticated the photocopy versions during his testimony.  
4 And when the Government utilized their signature expert he  
5 only confirmed to the court during testimony that he had only  
6 seen the photocopy versions of those. So the Government had  
7 withheld under best evidence rule, Rule 1002, and withheld the  
8 original ink versions that the Government recovered from  
9 Mr. Kaiser himself a week before trial.

10           The reason I raise that, Your Honor, is that the  
11 chief operating officer, who had originally met with  
12 Mr. Constantine to approve the authorization of the consulting  
13 agreement with Mr. Constantine, subsequently managed the  
14 entire Centrum loan process with our Hawaii lawyers at Carl  
15 Smith Ball and the subsequent negotiation of the short-term  
16 loan with Mr. Jowdy, which is documented in a few of my briefs  
17 as PK22. And I can get you the Bates stamp number if you like  
18 is that Mr. Manfredi did tell the FBI that there were  
19 consulting agreements with Mr. Constantine, so I'd just ask  
20 where those consulting agreements are and if the ones that  
21 were presented only as photocopies to the court I now -- are  
22 not the authentic consulting agreements Mr. Manfredi was  
23 referring to at the time.

24           THE COURT: Let me -- I want to -- it's 2:30 so I  
25 want to try to get this done. But how do you want to deal

1 with -- I'm going to give Mister -- I'm just going to tell  
2 Mr. Kenner, I'm going to give you 15 more minutes.

3 MR. KENNER: Yes, sir.

4 THE COURT: Again, this is just to highlight -- I  
5 have all your submissions and you're certainly thorough in  
6 your writings, so don't feel -- this is -- you can cover  
7 whatever you want, but I'm only going to give you 15 minutes.  
8 Okay.

9 But do you want me to call Magistrate Judge  
10 Tomlinson or do you want to take a break from here and come  
11 back?

12 MR. HAGGANS: I think my reply to arguments that are  
13 made will be brief and if that's the last issue the Court  
14 wishes to address today --

15 THE COURT: Yeah.

16 MR. HAGGANS: -- I would think -- I would hope we  
17 would be done by 3 o'clock and if the Court would make that  
18 call --

19 THE COURT: Okay.

20 MR. HAGGANS: -- I would be most grateful.

21 THE COURT: All right. Okay. Go ahead, Mr. Kenner.  
22 You've got 15 minutes.

23 MR. KENNER: All right. Thank you, Your Honor. So  
24 we've got -- as far as leadership goes, you know, Mister --  
25 excuse me. Under U.S. v. Greenfield, which I quoted the

1 citation earlier, the -- there was no recruitment or  
2 supervision of lower-level participants that are on the record  
3 having worked for me or been recruited by me. And at best on  
4 the record it showed that any connection to the case  
5 Mr. Constantine and I shared, you know -- handled our  
6 individual roles in whatever deemed fraud there was in the  
7 case. Even in U.S. v. Greenfield, they referred to U.S. v.  
8 Katora, K-A-T-O-R-A, 981 F.2d 1398, 1992 in the Third Circuit,  
9 where they -- they refer to it as offense level was improperly  
10 increased in Katora under the sentencing guidelines on the  
11 grounds that the defendants were organizers. But the  
12 defendants were the only participants in the offense and  
13 shared equal responsibility and were organizers only in the  
14 sense that they were planners of the offense. And the  
15 district court could not enhance sentences of the duo when  
16 they bore equal responsibility for organizing their own  
17 commission of the crime, even though they also organized non-  
18 culpable office staff or outsiders to the fraud, and in our --  
19 and in the instant case there were no other organized non-  
20 culpable office staff or anyone who worked for us.

21 Under -- to finish on that, I also did reference --  
22 and I'd just refer Your Honor to my *pro se* submission of ECF  
23 642 to address the last of the Government's objections. But  
24 in -- in *Rajraj Rotnum* [ph.] at Page 17 in my submission, you  
25 know, it also claim -- it also quotes from the Second Circuit

1 the factors the court should consider include the claimed  
2 right to a larger fruit of the crime. And as the record  
3 shows, there's effectively no fruit of the crime that ends up  
4 in my proceeds, in my possession as ill-gotten gains  
5 notwithstanding the Court's view of Mr. Constantine repaying  
6 me the \$117,000 and Mr. Gaarn repaying me about \$160,000 from  
7 the loans he testified to the court that were part of the  
8 case.

9           With respect to loss factor, Your Honor, you know,  
10 I've briefed it very thoroughly and I've -- and I've referred  
11 quite often in those briefings to Second Circuit cases Ebers  
12 [ph.] to the Second Circuit case Novak, Leonard. Each of  
13 those cases require the court for loss factor to separate the  
14 fraud and the non-fraud factors in the case where they  
15 effectively suggest that even in one of the cases where -- in  
16 McCallum, which is a Western District here in the Second  
17 Circuit, an individual actually went out and recruited --  
18 solicited \$600,000 for an investment with the knowledge ahead  
19 of time that he was going to steal \$200,000 and buy a house  
20 for his in-laws. And the court held that McCallum, the  
21 defendant, was solely responsible for the \$200,000, not the  
22 \$400,000 that went into the actual investment.

23           The Government has during their forfeiture memo had  
24 suggested that the -- excuse me -- quoted all Ponzi scheme  
25 cases and cases where the entire case, the entire transactions



1 were based on nothing but a fraud where people were soliciting  
2 money to buy stock and they never bought stock.

3           And that is just not the case in any of these  
4 transactions. There's been litigation for years over the  
5 Eufora Corporation. In fact, when we hired Rudy Giuliani's  
6 investigation group his group after -- after their due  
7 diligence decided they wanted a six percent equity stake in  
8 Eufora and this was after they had vetted all of Mr. Gaarn and  
9 Mr. Constantine's stock that was raised and I reference that  
10 in my reply memo to the -- to the court.

11           The Hawaii project we effectively were able to --  
12 through our transactions between myself, Mr. Kaiser and  
13 Mr. Manfredi as the management team were able to secure 105  
14 million-dollar loan from Lehman Brothers a year after we  
15 walked away from their five million-dollar loan. So it was a  
16 much different transaction we walked away from and  
17 Mr. Manfredi had documented to the Court as an egregious loan  
18 that we would have lost the entire property to Lehman  
19 Brothers.

20           And lastly, under the loss factor under the Global  
21 Settlement, I think Your Honor at ECF 501, Page 60, had  
22 referenced that Mr. Constantine had overspent based on the  
23 most aggressive estimates, \$17,000 of the Global Settlement  
24 Fund that he solely curated and managed according to  
25 Mr. Peca's testimony at trial and Mr. Richards -- Attorney

1 Richards' testimony at trial and Tyson Nash's testimony in a  
2 separate proceeding pretrial that was in the 3500 material.

3           The loss factor I would just encourage Your Honor to  
4 take a look at my most recent submission on that to utilize  
5 both the star, the Schelaff [ph.], the Novak, the Leonard and  
6 the Ebers factors with respect to separating fraud and non-  
7 fraud factors, understanding what the individuals receive that  
8 they bargain for.

9           And if I could just suggest that in the Eufora  
10 transaction at the exact contemporaneous time that  
11 Mr. Constantine and Mr. Gaarn had sold their stock  
12 Mr. Constantine and Eufora had secured a three million-dollar  
13 operations loan for the corporation. And after their six  
14 months of third-party independent valuation on the corporation  
15 had a 20 million-dollar value on the company. So even under  
16 the most egregious and aggressive calculations under Novak and  
17 the Novak ruling, you would see that approximately 3.38  
18 percent of the value the individuals bargained for is what  
19 they effectively lost out of the \$700,000 of stock that was  
20 purchased by individuals in the superseding indictment,  
21 whether it be from Mr. Constantine or Mr. Gaarn.

22           With respect to sophisticated means, Your Honor, I  
23 know that -- and I would agree with Mr. Talken that, you know,  
24 it's -- it's an incredible -- it's a very diverse case with a  
25 number of different issues that took place over a significant

1 period of time. But PSR and the Government have effectively  
2 relied heavily on the fact that they suggested for  
3 sophisticated means that it was the cover-up that we had used  
4 by allegedly forging Mr. Kaiser's name on two documents. And  
5 as I briefed again at ECF 783 and have just referenced to the  
6 Court a few minutes ago, you know, the Government I think  
7 pulled a fast one on the -- on the court and the jury by not  
8 submitting the original link version to their expert and  
9 letting the expert know that those original ink versions were  
10 custody-ed [ph.] at Mr. Kaiser's house for ten years which  
11 just boggles my mind at how he could hold the original ink  
12 signatures at his house for ten years, that they were somehow  
13 forged.

14 I mean, in one of the law journals I just recently  
15 read it said that a prosecutor would have to think that this  
16 piece of evidence is so exculpatory in nature that it actually  
17 undermines my belief that a guilty verdict would be worthy of  
18 confidence. Once I turned over this evidence I can assume my  
19 zealous efforts to obtain a guilty verdict that I have just  
20 concluded will not be worthy of confidence. And it's from the  
21 book *Fallen Super Heroes and Constitutional Mirages*, Brady v.  
22 Maryland. You know, it just reminded me of what the  
23 Government had done with the non-submission of the ink  
24 versions.

25 They do have the actual ink versions in their

1 documentation that I saw after trial as GX7004 and GX7005, but  
2 they consciously avoided submitting that both to the court,  
3 admitting it through their expert, admitting it to Mr. Kaiser  
4 and certainly not letting their expert know that Mr. Kaiser  
5 was in possession creating real issues.

6 THE COURT: You have like five minutes left and I  
7 want to make sure -- I don't know what else you want to cover.  
8 I want to make sure you have time for the obstruction of  
9 justice enhancements, so maybe you should move to that just to  
10 make sure you cover it.

11 MR. KENNER: Yes, sir. Thank you. I will move  
12 exactly there.

13 Under obstruction of justice 3C1.1, I'd just like  
14 to, you know, again ask the Court to refer to my ECF 642  
15 submission and just remind the Court that in 2006 I was the  
16 whistleblower on the Jowdy crimes to all of my investors. I  
17 was the first person to proffer to the FBI in 2009 when they  
18 contact -- finally contacted me and the investors about the  
19 Jowdy crimes. I was the one who volunteered for grand jury  
20 testimony in 2009. The Government cancelled it in spite of  
21 calling me a liar for that during trial at Transcript 5064 and  
22 65 and also again a liar at 5051 saying that there were no  
23 such subpoena and cancellation of subpoena documents, even  
24 though they came right out of Mr. Miskiewicz's own office in  
25 the Eastern District.

1           You know, I was the one who organized the FBI  
2 interviews for all the Hawaii line of credit and Mexico  
3 investors within three months of their line of credit seizures  
4 which a couple guys testified at trial that they were unaware  
5 of even though the empirical evidence shows that they were  
6 communicating with me on the exact days that the seizure took  
7 place and they were communicating directly with Northern Trust  
8 Bank.

9           But I set up the phone calls six days after my  
10 proffer to the FBI on June 24 of '09 and I set it up for  
11 Mr. Sydor, Peca, Berard, McKee, Norstrom and Stevenson. Five  
12 of those guys were line of credit holders. So there could  
13 have been no better time for the FBI to interview each of them  
14 if they were truly upset about the line of credits being  
15 seized and having no knowledge of them or the use of them  
16 despite the dozens of documents they signed annually that I've  
17 submitted to the court to show that it was not just improbable  
18 but impossible for them not to be aware of their annual use of  
19 those funds.

20           But it was a -- it was Mr. Galliado [ph.] who  
21 cancelled all those -- all of those interviews. Probably at  
22 the most apropos time to have an interview contemporaneous  
23 with the seizure of those -- of that collateral. You know,  
24 the Government suggested that I had obstructed justice by  
25 continuing to forward evidence and documents to my investors

1 for subsequent litigation they were filing in Mexico against  
2 Mr. Jowdy. The irony is the guys that received those  
3 documents were the same ones that were simultaneously or  
4 contemporaneously suing Mr. Jowdy in Delaware on a books and  
5 records matter and I was helping them proceed in Mexico on a  
6 Mexican matter through contacts that I had established before  
7 they had arrested me. But I was in possession of all the  
8 evidence as the Government turned over to me so that was my  
9 participation in assisting my investors get the money.

10           You know, throughout trial the Government has made  
11 five summation statements including in addition to an opening  
12 remarks statement that I had stolen the money and bought my  
13 equity in Mexico with that. At post-trial we found out that  
14 none of that was true, that I didn't steal any of the Hawaiian  
15 money and none of it was used to buy my properties in Mexico.  
16 None of it whatsoever. And that's what the -- the lawsuits  
17 were that the individuals were filing in Mexico at that time.

18           I also delivered the Home Depot tape that I had made  
19 of my conversation with Mr. Constantine immediately to Rudy  
20 Giuliani investigation team the day after I received it and  
21 it's specifically referring to himself as both the bank robber  
22 and the get-away driver, never referencing me. You know, even  
23 Constantine's attorneys through the 30 minutes of ramblings,  
24 you know, said that they failed to understand his references  
25 in those when Mr. Luroso [ph.] spoke at Transcript 4425 and

1 26. And during Luroso's in effect of counsel reply it refers  
2 to an ECF 729 at Page 14 Constantine's references to half-  
3 truths throughout the entire representation of the statements.

4 So, you know, anything that the Home Depot  
5 conversation was there was no problem with that ever coming  
6 into the trial. I think we're the ones who introduced it into  
7 the trial because it was a -- it was just a verbal vomit of  
8 the typical Constantine language that Mr. Stolper [ph.] and  
9 Mr. Giuliani's team had become accustomed to and so had we as  
10 investors or associates with the Hawaii -- excuse me, the  
11 Eufora project.

12 Lastly --

13 THE COURT: You have less than one minute.

14 MR. KENNER: -- under use of trust if I can have one  
15 minute, Your Honor --

16 THE COURT: Yeah.

17 MR. KENNER: -- it's just that the Government only  
18 claimed that -- has claimed that at ECF 471 at 9 that I was a  
19 financial advisor that they put on the FINRA representative.  
20 I forget what the gentleman's name is. Maybe Mr. Nealy [ph.].  
21 At Transcript 2481 he actually says that my FINRA registration  
22 which was never used by me in my entire business career, by  
23 the way, terminated on November 5th of 2004. That's when the  
24 FINRA approval ended. The first transaction related to  
25 somebody in the superseding indictment isn't till months and

1 months later.

2           So I was not a FINRA representative. I didn't ever  
3 accept the FINRA duty of care standard in this and that's  
4 where they suggested the abuse of trust is because I was a  
5 financial advisor, which I have never been a financial  
6 advisor. I've been a marketing rep and a business manager  
7 through my entire career and I know it parses words, but  
8 they're very important words at that point. But I was never  
9 held under FINRA standards. And if Your Honor reviews my  
10 standard advisor agreements that any of my investors were  
11 under at the time in 2003 and beyond, there is no standard of  
12 care that references an abuse of trust that the Government can  
13 point to throughout the entire case.

14           And even with -- lastly, even with the limited power  
15 of attorney that I had, Your Honor, there's evidence on the  
16 record and there's evidence in the Government's Rule 16  
17 production that I never had the ability to transfer funds  
18 without the client's double independent verbal authorization  
19 with their actual FINRA agent and their custodian of record.  
20 And that's at ECF 668, Appendix at 124. It's at also at 258,  
21 260 with Government Exhibit 760 when Mr. Nash testified to it  
22 and also through Mr. Ranford at 347 and 48 in that same  
23 appendix.

24           You know, I had no Eufora control at any point in  
25 time, Your Honor. I had no GSF control at any point in time



1 as testified by Attorney Richards at 3805 to 3816. Mr. Peca  
2 testified to the same at Transcript 540 and Mr. Nash, as I  
3 previously said, had testified pretrial in 3500 material TN-3  
4 at Page 12. And there was not a single unauthorized Hawaiian  
5 transaction that Your Honor will find. If Your Honor refused  
6 the operating agreement that I was held to in Hawaii as the  
7 managing partner that we had admitted as Kenner Exhibit 217 at  
8 Transcript 4525, those are the -- those are the documents I  
9 was legally bound to operate within. And at all times,  
10 whether it be the Constantine transaction for consultancy or  
11 the 16 other consultants we hired or the loans to Mr. Jowdy or  
12 the other entities that had received short-term loans that  
13 were all repaid, they all operated inside those agreements and  
14 that's what the Government had referred to in probation and  
15 referred to as abuse of trust.

16 THE COURT: All right. Thank you, Mr. Kenner.

17 MR. KENNER: I'm sorry, Your Honor, for going over a  
18 few minutes.

19 THE COURT: No, that's okay. You had a lot to cover  
20 and obviously, as I said, I have your -- your written  
21 submissions as well. All right.

22 Mr. Haggans, do you want to respond?

23 MR. HAGGANS: Thank you, Your Honor. Government  
24 believes it's addressed all of the points raised in the course  
25 of both arguments in its prior submission ECF number 471 back

1 in May of 2017. And so I'll only highlight a couple of points  
2 for the Court's consideration.

3 First, on the obstruction objections made by both  
4 defendants, with respect to Mr. Constantine, counsel did not  
5 address some of the other examples that the Government cited  
6 in its brief. In particular, some sworn statements submitted  
7 by Mr. Constantine that were directly contradicted by trial  
8 testimony of other witnesses.

9 I'd also note, although it did not exist at the  
10 time, the Court can and should consider the submissions in the  
11 course of the Rule 33 in effect of assistance of counsel  
12 allegations. As the Government pointed out in its opposition  
13 to the defendant's briefs on those points, he made a number of  
14 allegations in a sworn statement to the court about the nature  
15 of his relationship and communications with counsel that  
16 counsel's response more than adequately refuted, demonstrated  
17 were not accurate.

18 With respect to Mr. Kenner's obstruction objection  
19 as the Court will remember Mr. Kenner testified at trial on  
20 numerous points and the jury's verdict is in direct refutation  
21 of his testimony.

22 Turning to the leadership enhancement, both  
23 defendants focus on the word "leadership" but tend not to  
24 focus on the words "organizer" or "manager," either of which  
25 would qualify for these enhancements.

1           With respect to Mr. Constantine, it sounds like the  
2 parties agree that it's at least the two-point enhancement, so  
3 the only issue is whether it's a four-point enhancement or  
4 not. The Government cited in its brief a number of cases  
5 including a Second Circuit case as recent as 2016 for the  
6 proposition that the leadership need not be of an entirely  
7 criminal group of persons. It can involve non-criminal  
8 persons so long as they're involved in and necessary for the  
9 execution of the scheme. And the Government cited in its  
10 earlier filing the long list of people that both defendants  
11 have to involve to execute the schemes that were proven at  
12 trial.

13           Turning to Mr. Constantine's specific objection to  
14 the bankruptcy enhancement -- excuse me, the enhancement  
15 relating to a misrepresentation in the course of a bankruptcy  
16 proceeding, the nexus of that as outlined in our brief was  
17 that it related to the ownership of Eufora. Ownership of  
18 Eufora was clearly a disputed issue at trial. It was one of  
19 the vehicles of the fraud and the jury's verdict demonstrates  
20 that the multiple representations that Mr. Constantine made  
21 about its value and about its ownership, including in the  
22 course of that bankruptcy proceeding, should not be credited.

23           Turning to sophistication, I think the trial record  
24 on its face makes clear that the means of the frauds were  
25 sophisticated and involved numerous wire transfers by numerous

1 banks amongst numerous investment vehicles including  
2 investments in multiple states and overseas. This was a  
3 sophisticated scheme.

4 Finally, and only because I feel like I must respond  
5 to it, Mr. Kenner's objection to the abuse of trust  
6 enhancement on the theory that because he was not a FINRA  
7 registered advisor he did not owe -- he did not occupy a  
8 position of trust with respect to his clients.

9 Every individual owes to others the duty not to  
10 commit crimes against them and Mr. Kenner was clearly an  
11 advisor of these individuals of these victims. He was a  
12 custodian of their funds. He invested funds on their behalf.  
13 He gave them investment advice. He had their trust. He  
14 abused it. The enhancement is warranted. Other than that the  
15 Government rests on its papers, Your Honor.

16 THE COURT: All right. Thank you.

17 So what I'd like to do just to set two dates. One  
18 date would be I -- I'm going to place my rulings on the record  
19 with respect to these various objections and resolve the  
20 guidelines calculation in advance of the sentencing date.  
21 Mr. Constantine, you can appear by phone for that because I'm  
22 just going to be putting on the record my rulings. There's no  
23 going to be any argument or discussion. Okay?

24 MR. CONSTANTINE: Thank you, Your Honor.

25 THE COURT: Mr. Talken, I'd prefer having you here,

1 but for some reason you can't make it, but I'd prefer to have  
2 you here just in case something else comes up, okay? And  
3 Mr. Kenner will be here in person.

4 So -- and then the second date would be the actual  
5 sentencing date and I know the Government mentioned that there  
6 may be some victims who may be from out of town who want to  
7 come, so I want to give them sufficient notice to do that.

8 MR. HAGGANS: Yes, Your Honor.

9 THE COURT: And obviously the forfeiture decision  
10 will come out in the interim. So just give me one second.

11 Do you have the calendar, Jim?

12 THE CLERK: Yes.

13 THE COURT: Yeah, so I'm looking at like March 3rd,  
14 4th or 5th for the actual sentencing date. Is that week okay  
15 for the Government now?

16 MR. HAGGANS: I'm tentatively scheduled to be out of  
17 the country that week, Your Honor. I don't know -- that's  
18 a -- I should specify that's a business trip, not a personal  
19 trip. I don't know if my colleague, Ms. Komatireddy, is also  
20 scheduled to be busy that day, but I think the next week would  
21 work for the Government.

22 THE COURT: March 10th?

23 MR. HAGGANS: It's fine. That's fine for the  
24 Government, Your Honor.

25 THE COURT: Wait. Hold on one second.

1 [Pause in the proceedings.]

2 Is that okay with -- well --

3 MR. TALKEN: If it has -- I'd prefer the 11th but  
4 the 10th --

5 THE COURT: Okay. No, 11th is good.

6 MR. TALKEN: -- has to be for the Government.

7 THE COURT: So let's say Mr. Kenner, 10:30 on  
8 March 11th; Mr. Constantine at 11:30. And I want that -- I  
9 want that to be a firm date, okay? Make sure -- because we  
10 have people making -- buying plane tickets and things like  
11 that, if there are any issues that come up between then we  
12 have to make sure they're resolved prior to that date, okay?  
13 Obviously this case is an old case. We need to move forward,  
14 all right? And then let me just get a date for -- I think  
15 what I'll do is -- just give me one second.

16 So the Government is going to get me that chart by  
17 the 29th. Defendants can respond to that chart by  
18 February 5th. So how about February 13th for this conference?  
19 No good?

20 MR. TALKEN: No, I'm here -- I think I'm in front of  
21 you at 10:30 on that day, so I guess we both need to miss that  
22 time.

23 THE COURT: Yeah.

24 MR. TALKEN: Florez.

25 THE COURT: Yeah.

1 MR. TALKEN: So --

2 THE COURT: So why don't we say 1:30?

3 MR. TALKEN: Yes.

4 THE COURT: Is that okay with the Government?

5 MR. HAGGANS: Yes, Your Honor.

6 THE COURT: So 1:30 on that date. I'll make my  
7 rulings on the objections and have the guidelines calculation  
8 completed and obviously if there any forfeiture issues at that  
9 point. My expectation will be the decision will be issued by  
10 that date. So if there are any follow-up issues, we can  
11 address them as well.

12 All right. You got those dates, Mr. Kenner?

13 MR. KENNER: Yes, Your Honor.

14 THE COURT: All right. The other thing is, I just  
15 want to note that I know in your letter you mentioned this  
16 issue regarding -- Ms. Komatireddy is not here, but I know she  
17 had said she was going to propose a path forward with respect  
18 to just memorializing this discovery issue. So I'm -- have  
19 you talked to her about that, Mr. Haggans? I don't know --

20 MR. HAGGANS: I only had an opportunity to speak  
21 with her briefly. Could I ask the Court if we could have  
22 until the same date as the defense reply --

23 THE COURT: Sure.

24 MR. HAGGANS: -- for the Government to file that?

25 THE COURT: Yeah. Have you had conversations about

1 that with her maybe? I don't know.

2 MR. TALKEN: I've -- you know, I FedEx'd her the --  
3 I reproduced them; actually was able to do it myself, so I  
4 didn't need funding for that, so --

5 THE COURT: Okay.

6 MR. TALKEN: -- I reproduced them, Fed-Ex'd them  
7 over.

8 THE COURT: You haven't heard back?

9 MR. TALKEN: No, but that's not -- that's not  
10 surprising based on --

11 THE COURT: Okay. All right.

12 MR. TALKEN: -- the volume of the materials.

13 THE COURT: All right. So yeah, if we could just  
14 get that letter. All right.

15 MS. O'CONNOR: Your Honor, we just wanted to clarify  
16 something with regard to the charts. You mentioned that you'd  
17 like us to address the Global Settlement Fund, the Hawaii  
18 investment funds, the line of credit to Eufora and Centrum  
19 loan money. But Your Honor did mention the other properties  
20 involving the chart, Freylies, the three Palms units and Del  
21 Mar.

22 THE COURT: Yeah, I want those taken out of -- taken  
23 out.

24 MS. O'CONNOR: It's the Government's understanding  
25 that defendant Constantine conceded his involvement in the



1 Palms fraud. It was he objected to their Freylies, Del Mar  
2 and the line of credit investment monies.

3 THE COURT: You could put in that letter where he  
4 conceded his involvement in the Palms fraud. I'll look at it  
5 again, but just give me the chart the way I asked, but if  
6 you -- I'll let you address that limited issue. Want to point  
7 me in the record where he conceded, which fraud? The --

8 MS. O'CONNOR: Palms.

9 THE COURT: All --

10 MS. O'CONNOR: The three Palms.

11 THE COURT: All three Palms?

12 MS. O'CONNOR: I believe so, Your Honor.

13 THE COURT: All right. I'll look at it. All right.  
14 All right. Thank you. Have a good day. |Your Honor, before  
15 we go just very quick --

16 THE COURT: Yeah.

17 MR. TALKEN: -- very briefly. This -- the one issue  
18 that's outstanding is this -- the trust issue. Trust still  
19 hasn't -- the money still is -- has not been released. I've  
20 been back and forth. The financial advisor has advised me  
21 that he needs an order from this Court saying that should the  
22 trustee that's been appointed, the special trustee be  
23 appointed, that they are ordered to inform the Court that that  
24 trustee is no longer in existence.

25 The reason for that is the way the original trust is

1 set up Mr. Constantine has the authority to hire and fire this  
2 special trustee, which obviously doesn't address the concerns  
3 of the Court and the Government. This will take care of that  
4 concern, but I just want Your Honor to know I'm going to give  
5 you a letter on that. I just want you to know where that's  
6 coming from.

7 THE COURT: All right. Yeah, and if you could  
8 direct the language of the proposed order that would be  
9 helpful, all right?

10 MR. TALKEN: Will do, thank you.

11 THE COURT: All right. Thank you. Have a good day.

12 ATTORNEYS: Thank you, Your Honor.

13 (Proceeding concluded at 3:01 p.m.)

14 \* \* \* \* \*

15

16

17

18

19

20

21

22

23

24

25

1 I certify that the foregoing is a court transcript  
2 from an electronic sound recording of the proceedings in the  
3 above-entitled matter.

4  
5  
6 \_\_\_\_\_  
7 Ruth Ann Hager, C.E.T.\*\*D-641

8 Dated: January 23, 2020  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25